

CONSTITUTIONAL PROTECTION OF THE RIGHT TO SOCIAL SECURITY IN SLOVENIA*

1. Introduction

The right to social security is recognised as one of the fundamental human rights in international¹ and European Union (EU)² law. It is also enshrined in many national constitutions, including the Slovenian one. As such, it cannot be regulated as a very precise and concrete legal rule. It is one of the basic values and guidance for all legal subjects in a society.

The content of the right to social security is rather open and there might be no direct correlation between the constitutional provisions and concrete rights stemming from the social security system. Hence, the right to social security has to be determined foremost by the national legislator, by regulating individual social security rights of insured persons (and other beneficiaries). National legislator is bound to respect minimum standards of international law and constitutional guarantees.

It could be argued that the Slovenian Constitution is a modern one. It was passed at the beginning of 1990-ties³ and includes the social state principle as well as fundamental social rights. Among them is the right to social security, which gained importance during the times of economic recession.

In order to comprehend the complexity and the meaning of the constitutional provisions, interpretations of the Constitutional Court have to be taken into account. Also the right to social security is construed by the Court, which has to determine the constitu-

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¹ See Articles 22 and 25 of the Universal declaration of human rights, Article 9 of the International Covenant on Economic, Social and Cultural Rights, Article 12 of the European Social Charter (ESC) and the revised ESC. For defining the content of the right to social security the ILO Convention No. 102 concerning minimum standards of social security has to be applied. Similar obligations arise also from the European Code of Social Security.

² The right to social security (and social assistance) is enshrined in Art 34 of the Charter of Fundamental Rights of the European Union, OJ C 83/389, 30. 3. 2010. See also other articles of this Charter which may influence the content of the right to social security, e.g. Articles 1 (Human dignity), 20 and 21 (equality and non-discrimination), 23 (gender equality), 24 (the rights of a child), 25 (the rights of the elderly), 26 (Integration of persons with disabilities), 35 (the right to health care), 36 (access also to social services of general interest).

³ Official Journal RS, No. 33/1991-I, last amendment in 47/2013.

tional core of the right to social security that cannot be invaded by the legislator. By doing so, the delimitation between social and private risks can be drawn. Especially during the times of economic recession the question, which is not really new, can emerge, i.e. who is responsible for providing income security when one of the traditional social risks or a specific situation of need occurs. Is it the duty of legal subjects (natural and juridical persons) governed by civil law, i.e. the individual him/herself, his/her family or his/her employer, or is it the responsibility of legal persons governed by public law, i.e. the State, local communities and public institutes.

Moreover, when shaping the legal position of an individual in a concrete case, not only decisions of the Constitutional Court, but also case-law of international courts of law and especially highest national courts is of the greatest importance. Due to very specific subject matter of social disputes, specialised (labour and) social courts have been established in Slovenia.⁴

In order to analyse the more general constitutional right to social security or more concrete individual social security rights, it is important to define what can be understood under social security. In more general terms social security is a public system of income protection in case of its loss or reduction (e.g. due to old age, invalidity, decease, accident at work or occupational disease, sickness, maternity or unemployment) or increased costs (e.g. for health care, raising of children or long-term care services), organised through a process of (broader or narrower) social solidarity.⁵

In international and EU law there is a clear distinction between social security and social assistance,⁶ also due to historical differences between subjective and enforceable social security rights and more discretionary right to social assistance. The Slovenian Constitution was inspired by the international documents and social assistance is not mentioned as part of social security. Nevertheless, the distinction between social security and social assistance has become more fluid, since elements of minimum (social assistance) protection can also be found in social security (in Slovenia predominately exercised by social insurances), and social assistance has become a subjective and enforceable right (although, some discretion has remained). Hence, the Slovenian legislator includes social assistance in the national social security system. Since there is no codification of social security law, the only legislative act, speaking of social security system is the Labour and Social Courts Act.

Focus of the present article is on the general constitutional guarantees in the form of constitutional social state, equality and rule of law principles and fundamental social rights. It is especially important to analyse the interpretation of the constitutional provisions by the Constitutional Court, and its impact on social security rights. This might be of utmost importance also during the economic recession, when social security are being more often challenged and modified.

⁴ Labour and Social Courts Act (*Zakon o delovnih in socialnih sodiščih*-ZDSS-1), Official Journal RS, No. 2/2004.

⁵ Strban, 2010/2011, p. 356. See also Pieters, 2006, p. 2.

⁶ For instance, the ILO Convention no. 102 contains no provisions on social assistance, In the European Social Charter Article 12 is regulating the right to social security and Art. 13 the right to social and medical assistance.

2. Slovenia as a social State

There are several constitutional provisions, which are rather important for shaping the social security system and limiting the legislator when he wishes to reduce the (personal and/or material) scope of social security rights. First, the general constitutional principle of Slovenia being a social State has to be mentioned.

Many national constitutions entail the social state principle. In some it has been subject to a very dynamic interpretation⁷ and in others the interpretation has been rather reserved. In Slovenia its meaning has been explained by the Slovenian Constitutional Court and legal theory, although, to far lesser extent than the principle of the state governed by the rule of law.

Both, social state and the rule of law principles are regulated in the same article of the Constitution.⁸ It has to be established, that this is no coincidence. Both are constitutional values, giving the state and the law a comprehensive and binding social policy task.⁹ The Constitution makes it clear that Slovenia is a social state governed by the rule of law. In other words, it is normative social state, which provides security and dignity of each person with legal regulation and within limits of the law.¹⁰ It is distinct from welfare state, which is realised especially within family and civil society.¹¹

Therefore, social nature of the Slovenian State cannot be perceived only as a programmatic, legally non-binding norm. It is a State goal, legally binding for all branches of State power.¹² According to the rule of law principle, constitutional provisions are legally binding for the legislative, executive and judicial power. The legislator has freedom to (re)shape more concrete social security rights, obligations and legal relations only within the constitutional framework and according to the criteria set therein.¹³ However, due to its general nature, social state principle could hardly be directly applied by the executive and judicial branches of State power. Thus, it is foremost binding for the legislator,¹⁴ which has to accommodate the obligations arising from the social state principle.¹⁵

There is also no coincidence, that the principles of social state and the rule of law are regulated at the very beginning of the Slovenian Constitution, among the general provisions, showing basic values of the Slovenian society. Such placement indicates their priority over other constitutional provisions, including the so called golden rule of fiscal

⁷ For instance in Germany the *Sozialstaatsprinzip* has been very dynamically interpreted, with its principles of social justice, social equality and social security. Extensively, Zacher, 1993/1.

⁸ Article 2 of the Slovenian Constitution.

⁹ Zacher, 1993/2, p. 279.

¹⁰ On the development of the modern state governed by the rule of law, which is regulating social relations and promoting its citizens and social democracy (inspired by the Napoleon III, *Extinction du pauperisme*, 1844), Eichenhofer, 2000, p. 18.

¹¹ Bubnov Škoberne, Strban, 2010, p. 29.

¹² Decision of the Slovenian Constitutional Court No. Up-39/94, 4.04.1995, OdlUS IV, 147.

¹³ Slovenia is a State governed by the rule of law (Article 2 of the Constitution). Additionally, the legislator (Article 153), the state administration (Article 120) and judiciary (Article 125) are bound by the Constitution.

¹⁴ Decision of the Slovenian Constitutional Court No. 282/94, 18.10.1995, OdlUS IV, 108.

¹⁵ Decision of the Slovenian Constitutional Court No. U-I-13/13, 14.11.2013, Official Journal RS, No. 98/2013.

policy, which has been introduced in the Slovenian constitution in 2013.¹⁶ In the event of possible collision the priority should be awarded to the basic constitutional values, among them to the (normative) social state principle.

The constitutional review from the viewpoint of the social state principle is traditionally very cautious and reserved. The Constitutional Court leaves a wide field of discretion to the legislator in choosing the most appropriate type and content of a measure, used to implement the social state principle.¹⁷

In its decisions, the Constitutional Court usually links the social state principle with other constitutional provisions. On several occasions it has linked it with fundamental social rights, also the right to social security.¹⁸ The social state principle has so far not been subject to a very dynamic interpretation by the Slovenian Constitutional Court. Only one sub-principle has been mentioned so far, i.e. the principle of solidarity, the content of which was not precisely defined either.¹⁹

2.1. Solidarity

Solidarity is the most important characteristic of social state and social security system as such. It is *differentia specifica* between social and private insurance (where certain reciprocity between insured persons may exist, but solidarity is as a rule absent).

Some argue that the notion solidarity stems from the Roman law, more precisely from *obligatio in solidum* (Latin phrase that means in total or on the whole). It regulates the situation, when two or more debtors vouch for the entire (total or whole) obligation of one of them.²⁰ In the times of the French revolution (1789) its slogan of liberty, equality and brotherhood (fr. *liberté, égalité, fraternité*) was developed. These values were incorporated also in the Universal Declaration of Human Rights. In its first Article we can read that all human beings are born *free* and *equal* in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of *brotherhood*. In the times of gender equality, it would be only equitable to add also in the spirit of sisterhood, or maybe a more general term of solidarity could be used (instead of brotherhood).

The notion of solidarity has gradually evolved in the French civil law (fr. *solidarité*). Later on in Catholic social ethics, solidarity was founded on charity and in social philosophy on nationality, since it reflected the idea of the nation as the great community in solidarity.²¹ Some define solidarity broader, as friendship on collective level,²² without limiting it to nationality. Others use solidarity when defining the measures of justice. An expression of justice is also solidarity justice, measure of which is each according to his/

¹⁶ Article 148 of the Slovenian Constitution.

¹⁷ Decisions of the Slovenian Constitutional Court Nos. U-I-310/96, 5.02.01998, OdlUS VII, 24, and U-I-128/97, 6. 4. 2000, OdlUS IX, 79.

¹⁸ Decision of the Slovenian Constitutional Court No. U-I-338/96, 9.12.1999, OdlUS VIII, 277.

¹⁹ Decisions Nos. U-I-137/03, 26. 5. 2005, OdlUS, XIV, 30, and U-I-36/00, 11.12.2003, OdlUS XII, 98.

²⁰ Kranjc, 2010, p. 545.

²¹ Becker, 2007, p. 1.

²² Kranjc, 2009, p. 92.

her needs.²³ This is most visible when the scope of sickness benefits in kind (health care) is determined. Medical benefits are not dependent on income or property or the level of contribution paid by the insured person. They are granted according to the needs of health situation of each patient.²⁴ So solidarity is expressed between healthy and sick insured persons. It is a form of horizontal solidarity, where a measure is not the level of income, but other personal circumstance, next to sickness or health also gender or family situation.²⁵

Solidarity has gained importance also in the EU law, where it is expressly mentioned. The EU Treaty emphasises the values, which are common to all member states²⁶ in a society characterised not only by pluralism, non-discrimination, tolerance, justice, equality between women and men, but also solidarity. Among distinctive forms of solidarity, solidarity between generations is stressed and should be promoted.²⁷

Moreover, the Charter of Fundamental Rights of the EU, which has the same legal value as the Treaties, explicitly mentions solidarity as an indivisible and universal value of the Union.²⁸ In a special chapter, titled Solidarity, the Charter regulates the rights to social security, social assistance and health care.²⁹ Although the Charter does not introduce new competencies of the EU,³⁰ it is an important guidance in interpretation of the EU law, also by the Court of Justice of the EU.³¹

Solidarity in a more specific sense also plays a role when it comes to the influence of basic economic freedoms and the EU competition law on national social security systems. According to the Court of Justice of the EU, systems based on solidarity (or carriers of such systems) cannot be qualified as undertakings and are exempted from the application of competition law.³²

Solidarity constitutes a core principle of European social security and unites European national constitutions by their shared values. It is laid down as an express legal norm in many constitutions.³³ In Slovenia, the Constitutional Court on several occasions mentioned solidarity between persons with higher and those with lower income (so called vertical solidarity) in parental care insurance.³⁴ Similarly, it decided that the legislator

²³ Pavčnik, 2001, p. 11

²⁴ Strban, 2005, p. 160.

²⁵ For instance, women could purely technically present a higher risk, since they use hospital services when giving birth, also children may be insured as family members, without additional contributions.

²⁶ The values are human dignity, freedom, democracy, equality, the rule of law and human rights. Article 2 of the EU Treaty UL C 326, 26. 10 2012 (consolidated version).

²⁷ Article 3 of the EU Treaty.

²⁸ Second paragraph of the preamble of the Charter of Fundamental Rights of the EU.

²⁹ Title IV, Articles 34 and 35 of the Charter of Fundamental Rights of the EU.

³⁰ Article 6 of the EU Treaty and Article 51 of the Charter of Fundamental Rights of the EU.

³¹ For instance C-34/09 *Zambrano* [2011] I-01177 or C-570/10 *Kamberaj*, ECLI:EU:C:2012:233. Solidarity is expressly mentioned in Case C-140/12 *Brey*, ECLI:EU:C:2013:565.

³² More in cases C-159/91 and C-160/91 *Poucet et Pistre* [1993] ECR I-637, but also in some later cases like C-437/09 *AG2R Prévoyance* [2011] ECR I-973. C-350/07 *Kattner Stahlbau* [2009] ECR I-1513 or in the field of social security of migrant workers C-345/09 *van Delft et al.* [2010] ECR I-9879.

³³ For instance, in Austria, Italy, Spain, France, Belgium and the Netherlands, the solidarity principle is at any rate invoked to establish and legitimate the existence of social insurance. Becker, 2007, p. 1.

³⁴ It established that limiting (to both ends) the calculation basis for the parental benefit is grounded in the principle of solidarity (decision No. U-I-137/03, 26.05.2005, OdlUS XIV, 30).

followed the solidarity principle when determining the lowest and the highest pension calculation base. It stressed that acknowledgment of this principle does not oppose the social state principle and also not from it deriving right to social security.³⁵

The Constitutional Court explicitly mentioned the intergenerational solidarity, i.e. solidarity between younger (active) and older (retired) generations.³⁶ Also the longer duration of the right to unemployment benefit for elderly insured persons was found to be in accordance with the Constitution, since it reflects the principle of solidarity.³⁷

Next to that the expression of social or societal solidarity was used in a concurring opinion of one of the Constitutional Court judges.³⁸ It was argued that the constitutional right to a pension is secured in a system that should enable social welfare and certain standard of living in a country, according to the principle of social solidarity. In another case solidarity between family members was taken as a basic starting point. The Constitutional Court argued that when the legislator decides to completely replace the family solidarity with social solidarity, it has to ensure such solidarity.³⁹

Sometimes the principle of mutuality is mentioned next to the principle of solidarity. They are not entirely overlapping principles. The Constitutional Court argued that social insurance is insurance which is not completely based on the principle of mutuality, but also on the principle of solidarity.⁴⁰ Mutuality as distribution of an insured risk to an insurance community, especially if all are equally at risk, may be characteristic of private insurances. Social insurances are guided by the principle of solidarity, which covers persons with different levels of risk and distributes burdens among them.⁴¹

Therefore, social insurance has to be mandatory. It is the only way to establish relations between persons who present a higher (social) risk with those who present a lower (social) risk. It may sound as a paradox, but due to such coercion (and mandatory pooling of risks) both groups may enjoy more freedom. An individual would be willing to engage in more risky activities, if he/she would be confident that there is a legally regulated social security system guaranteeing certain rights in case of sicknesses or injury, unemployment, old-age, invalidity or to the family members in case of decease.

2.2. Social justice

It could be argued that next to solidarity and social security (analysed under next point), also social justice is among the basic emanations of the social state principle. Social justice is also at the core of the oldest specialised organisation of the United Nations, i.e. already in the year 1919 founded International Labour Organisation (ILO). The ILO received the Nobel peace prize at the occasion of its 50 years of existence in 1969. On that occasion, Mrs. Aase Lionaes, Chairman of the Nobel Committee, stated that beneath the

³⁵ Constitutional Court decision No. U-I-36/00, 11.12.2003, OdlUS XII, 98.

³⁶ Constitutional Court decision No. U-I-6/03, 19.05.2005, not published.

³⁷ Constitutional Court decision No. U-I-282/94, 18.10.1995, OdlUS IV, 108.

³⁸ To the decision No. U-I-281/09, 22.11.2011, OdlUS XIX, 29.

³⁹ Constitutional Court decision No. U-I-11/07, 13.12.2007, OdlUS XVI, 86.

⁴⁰ For instance decision of the Constitutional Court No. U-I-137/03, 26.05.2005, OdlUS, XIV, 30.

⁴¹ Strban, 2013/1, p. 346.

foundation stone of the ILO's main office in Geneva lies a document on which is written: *Si vis pacem, cole justitiam* – If you desire peace, cultivate justice.⁴² ILO is therefore opposing the old military tradition, which is loyal to the maxim *Si vis pacem, para bellum* (if you want peace, prepare for war).

ILO is endeavouring to achieve universal and lasting peace, which can only be established, if it is based on social justice.⁴³ Social justice and social (security) rights are inevitably linked, since social justice can hardly be achieved without social rights. They are based on the presumption of principal equality of everyone and belief that optimisation of individual benefit does not necessarily guarantee the highest social benefit.⁴⁴

Discussion on social justice is not only discussion on the role of the State in the society that is based on free economic initiative⁴⁵, it is also discussion on the legal position of an individual. It can be appealing to promote freedom as living from other independent live, in which the State should not intrude or its regulation should be reduced to a minimum. Reducing social security benefits (in cash and in kind) means less public revenue and expenditures, less redistribution and less social rights. Within this idea it is advocated that individual should dispose with more income, whereby private spending (within or outside the country) is promoted, demand and working places guaranteed. Less State should be not only more equitable, but also more efficient. In Slovenia there is an ongoing discussion on introducing the cap on social security contributions (paying them only from certain amount and higher income would be contribution free). Advantage would be given to persons with higher income, who would have to be privately insured in order to protect their position, and vertical solidarity would be reduced.⁴⁶

Advocates of social justice promote increased role of the state, more social (security) benefits and higher public expenditure. The State is not only responsible to protect the rights of an individual, but equal freedom of all and thereby social peace. Social inequality may lead to distinctive forms of inequality, and divides the society. Reduction of social rights may disproportionately affect the most vulnerable groups in the society (like sick, elderly, disabled persons and children) and deepens social inequalities. In Slovenia there is an in depth discussion on equal access of medical treatment outside of Slovenia (in another EU member state), is it guaranteed to all or just those who can afford it.

Discussion on social justice reveals that social justice is not very precisely defined notion, which can be subject to distinctive interpretations. Nevertheless, there is no doubt, that more social (security) rights, which are adjusted to distinctive legal position of person in the country, may increase social justice. It would be wrong to presume that economic outcome and social justice are mutually excluding concepts. Economic and social policy should promote not only economic growth, which can be the basis for social redistribution, but also social justice.⁴⁷

⁴² The entire Award Ceremony Speech is accessible at http://www.nobelprize.org/nobel_prizes/peace/laureates/1969/press.html, May 2014.

⁴³ ILO Constitution (1919) and ILO Declaration of Philadelphia (1944).

⁴⁴ Eichenhofer, 2012, p. 10.

⁴⁵ Article 74 of the Slovenian Constitution is advocating free enterprise.

⁴⁶ Strban, 2013/2, p. 3.

⁴⁷ Ibid.

3. Fundamental social rights

The Slovenian Constitution enshrines not only the social state principle, but also fundamental social rights, among them the right to social security. It is situated in the second part of the Constitution under Human Rights and Fundamental Freedoms. This means that it enjoys equal legal status as other human rights, including civil and political rights. This implies that the way the right to social security is exercised has to be determined by legislative acts, it has to be guaranteed equally to all, regardless of their personal circumstances, and there has to be a possibility of judicial review. The right to appeal, when deciding on social security rights, and the right to constitutional complaint have to be guaranteed.

3.1. Personal and material scope of the right to social security

Personal scope of the constitutional right to social security is restricted to citizens, i.e. to Slovenian citizens. This might be contested. Foreign citizens, legally or even habitually residing in Slovenia and employed there are not expressly protected. However, it is argued that such a provision might be justified, if it is construed in the manner that Constitution only provides minimum protection, which might be restricted to nationals. However, the legislator is free to extend the personal scope of the right to social security. Moreover, it is argued that the legislator is obliged to do so. Provisions of the international legal instruments prohibiting discrimination on the grounds of nationality, especially in contributory schemes, and equal treatment of the EU nationals, have to be respected.

As a consequence, social security rights, stemming from social insurance schemes are covering also non-nationals, if they meet the eligibility conditions. In addition, no permanent residence in Slovenia is required to be socially insured. Such conditions might be set in non-contributory schemes, like social assistance and family benefits schemes. But also there, Union nationals have to be treated the same way as Slovenian nationals.

Material scope of the right to social security is neither defined nor fully determined in the Constitution. There is also no codification of social security law. Hence, this vague and multi layered notion has to be filled by the legal science and (constitutional) jurisprudence with its case-law. The Constitutional Court acknowledged that the right to social security presents a very complex structure of possible contents and relations, dictated by various circumstances. The constitutionality review is therefore necessarily reserved and restricted to the test, whether the legislator's solution is in accordance with public interest. The Constitution gives the legislator a possibility to choose between the measures available that are appropriate to meet his obligations. At the same time the legislator is bound to respect fundamental rights and general constitutional principles.

As in some other continental European states, also in Slovenia the main path to exercise the right to social security is social insurance. Slovenian Constitution explicitly determines the obligation of the State to regulate mandatory health, pension, invalidity and other social insurance, and ensure its proper functioning. Although, only some social insurance branches are mentioned, enumeration is not exhaustive, since (all) other social insurance branches enjoy constitutional protection as well. The legislator has introduced

next to mandatory health, pension and invalidity insurance, also unemployment insurance and parental care insurance, which have been assessed by the Constitutional Court. Under discussion is also separate long-term care insurance.

The Constitution stresses that insurance has to be mandatory and social. The State has to introduce and supervise insurance which is characterised not only by the principle of mutuality, but principle of solidarity as well. It is argued that the legislator could not fulfil his obligation by obliging the citizens to conclude private insurance contracts for social risks. Next to being mandatory and social, social insurance remains based on the insurance principle. It is argued that introducing solely national protection (in a form of national pensions or national health service) or only social assistance schemes, would go against the constitution.

Despite of these restrictions, the legislator has a wide field of discretion to determine the rights and obligations of legal subjects involved in the social insurance relation. For instance, it determines which rights should be provided, eligibility conditions, scope of rights, i.e. their level and duration, the amount of contributions to be paid, number and internal structure of insurance carriers.

One of the recent decisions of the Constitutional Court is emphasising the social insurance relation established in mandatory (social) health insurance. Sickness cash benefit has to be provided by the employer, as a rule for the first 30 days of absence from work. After that it is provided from the funds of the mandatory health insurance carrier (*Zavod za zdravstveno zavarovanje Slovenije-ZZZS*). However, it still has to be paid by the employer, who may ask for the refund from the ZZZS. The Court argued that the possibility of insured person to claim sickness cash benefit only from his/her employer, even when it has to be paid by the ZZZS, is against the constitutional right to social security. Problems could arise, if the employer was insolvent, and the worker was directed to the public guarantee fund, without direct claim against the ZZZS.

The decision caused modifications of the Labour relations act and the Rules of mandatory health insurance. Now a direct claim at the ZZZS is available, but only if the employer has no possibility to pay his workers. Otherwise, the employer still has to pay the sickness cash benefit and ask for refund from the ZZZS. Hence, it is clear that it cannot be the employer's choice not to deal with his workers in the case of sickness, and leave them to seek their right at the ZZZS alone. Employers still have all the information required to pay the sickness cash benefit. The other option would be that the ZZZS collects more information and pays the sickness cash benefit directly. In either case, no excessive burden should be transferred to the workers.

From 2004 the constitutional right to social security was amended and one of the social security rights is now expressly mentioned, i.e. the right to a pension. Legal value of such addition was questioned at first, since the Constitution already mentions mandatory (social) pension insurance, which obviously enough has to provide a pension to active, insured persons, based on their contributions and proportional to their wages. Additionally, the Constitution does not define the notion pension. It may encompass various pensions based on contributions, including old-age, widow/er's or family pension. The constitution cannot determine the eligibility conditions and the exact scope of the right to a pension is the task of the legislator. Nevertheless, the Constitutional Court used the

opportunity and provided not only social security, but also property protection argument (discussed below) to secure the right to a pension.

It is argued that one of the deficiencies of the Slovenian Constitution might be no express guarantee of the right to social assistance. However, the Constitutional Court ascertained that an individual or a family without sufficient resources enjoys constitutional protection. It has linked a constitutional social state principle with a fundamental human right to social security in order to establish the duty of the State to provide the endangered individual appropriate assistance. It also recognised that personal dignity could be invaded, when changes to the pension and invalidity insurance scheme would lead to poverty of the claimant. In this case his/her freedom, protected by the right to personal dignity and safety, could become questionable.⁴⁸ It is also clear that the legislator perceives social assistance scheme as an integral part of the Slovenian social security system.

3.2. Other fundamental social rights important for social security position of an individual

Slovenian Constitution acknowledges not only the right to social security, but also some other social rights. Among them is the right to health care. It is not limited to nationals, since everyone has the right to health care, under the conditions determined by law (it can be guaranteed from public and private means). The State is rather hesitant to precisely determine the right to health care in its Constitution, as it could turn out to be a large investment.

It could be argued, that the right to health care supplements and broadens the constitutional right to social security, which is exercised also by mandatory health insurance. It is the duty of the State to guarantee all forms of access to health care, among them geographic, financial, timely, informational and procedural access to high quality health care to everyone.

Slovenian Constitution confers special rights to disabled persons. This provision is broader than the right to social security, which is exercised also via the invalidity insurance. The State is under obligation to provide protection and work training not only to work invalids, i.e. those who acquired the rights under the mandatory invalidity insurance, but also all other disabled persons. This provision should enable the inclusion of disabled persons into the life of the society. The constitutional obligation to provide special protection to disabled children and severely disabled persons is partially met by providing such protection in the social security system.

The constitutional obligation of the State to protect family, motherhood, fatherhood, children and youth, and to create proper conditions for this protection have to be considered also when the legislator introduces modifications of social security rights.

⁴⁸ Constitutional Court Decisions Nos. U-I-330/97, 30.11.2000, OdlUS IX, 281 and U-I-36/00, 11.12.2003, OdlUS, XII, 98.

4. Slovenia as a state governed by the rule of law

Slovenia is not only social state, but also state governed by the rule of law. This principle or argument has been extensively construed by the Constitutional Court and many sub-principles were deducted from it. It proved to be of importance also when reshaping social security rights.

4.1. Adjustment of the law to social relations

Even before the economic recession and especially during it, the social security law is subject of many modifications and amendments. It can be argued that it is one of the most rapidly changing areas of law. When the social security system wants to fulfil its basic task and provide security to the people, it has to be adapted to continuously changing society. Also the Slovenian Constitutional Court recognises the principle of adjustment of the law to social relations as one of the principles of the state governed by the rule of law. The legislator does not only have the right, but is under obligation to modify and amend legislative acts in the social security field, if that is dictated by the changed relations in the society.⁴⁹

Social security rights have to be faithful companion of every member of the society from his/her birth (or even before, with benefits to a pregnant women), during the life time (with benefits during the periods of sickness, invalidity, unemployment or rearing of children) and even after that (with certain benefits to family members of a deceased socially insured person). The Slovenian Constitutional Court argues (using the example of pensions) that social security (in the form of social insurance) has to provide continuity of the standard of living.⁵⁰ Cash benefits have to be proportional to income from which the contributions have been paid. Suitable (not only minimum) protection has to be provided, in order to prevent poverty and social exclusion and enable free development of each individual and the society.

4.2. Protection of vested rights

Although modifications are required, the same principle of the state governed by the rule of law requires that vested rights and rights in course of acquisition are preserved to a certain extent. Thus, if social security is to provide real security, people should be able to rely on it and should be protected in their rights and legal expectations.⁵¹

Such protection is guaranteed by the principle of trust in law, deducted by the Constitutional Court from the state governed by the rule of law principle. It guarantees to the individual that the State will not worsen his/her position arbitrary, without sound reason, founded on a predominated and legitimate public interest.

⁴⁹ Constitutional Court decisions Nos. U-I-69/03, 20.10.2005, OdlUS XIV, 75 and U-I-307/11, 1.12.2011, Official Journal RS, Nr. 100/11 and 36/12.

⁵⁰ Constitutional Court decisions No. U-II-1/11, 14.03.2011, Official Journal RS, Nr. 20/2011.

⁵¹ Pieters, Zaglmayer, 2006, p. 3.

Slovenian Constitution allows that some provisions of the law may have retroactive effect (*ex tunc*), but only if that is in public interest and already acquired rights are not invaded.⁵² Hence, already acquired rights are explicitly protected by the Constitution. However, this does not mean that they cannot be changed for the future (*ex nunc*). The condition is that changes do not oppose the constitutional principles and other constitutional provisions, including the principle of trust in law. Therefore, the scope of rights determined by law may be diminished by law, but only with validity for the future and taking into account the right to social security.

The principle of trust in law is neither an explicit constitutional principle nor is it a constitutional right. The latter enjoy stricter constitutional protection against possible limitations and other intrusions.⁵³ Therefore, the principle of trust in law does not enjoy absolute protection and may to a larger extent be subject to certain limitations. In case of its collision with other constitutional principles or rights, it should be weighed in the process of balancing of values, to determine which of the constitutionally guaranteed values should be given priority in each case.

For instance, the Constitutional Court established that in the case of relative diminishment or slower increase of pensions as expected according to the former legislation, the principle of legal certainty or trust in law was affected. However, the intervention has been urgent to secure other principle or value of public interest, which should be given priority. The burden of the active generation (and the economy in general) to finance pensions should not be of a proportion to make economic growth impossible and disturb the acceptable relation between the active and the retired generations. Intrusion into the principle of trust in law was therefore seen as admissible. It was necessary and it was not excessive. The Court argued that otherwise it might come to unbearable differences between the active and the retired generations and serious breach of the social state principle.⁵⁴

The question of intrusion into vested right was raised also during the economic recession (in 2012), when the right to a state pension was abolished, also of persons who were already receiving it. The argument was that it was a specific form of social assistance for elderly, financed out of the state budget and not social insurance based right. As such it was not protected by the Constitution. Distinctive forms of social assistance should be interchangeable and the legislator is responsible to choose the most appropriate ones. Recipients of the abolished state pension could be entitled to social assistance or newly shaped supplementary allowance. Although the mere abolishment of the right (without constructing any new right) was criticised, the Constitutional Court did not have a chance to evaluate constitutionality of such legislative decision. One of the reasons might be that social assistance recipients are less active with (constitutional) enforcement of their rights.

⁵² Article 155 of the Slovenian Constitution.

⁵³ Article 15 of the Slovenian Constitution.

⁵⁴ Constitutional Court decisions Nos. U-I-31/96, 26.11.1998, OdlUS VII, 212, U-I-150/94, 15.06.1995, OdlUS IV, 63, and U-I-277/05, 9.02.2006, OdlUS XV, 15.

4.3. Protection of legal expectations

Not only acquired rights, but also legal expectations and promise of future social security rights enjoy constitutional protection to a certain extent. Slovenian Constitutional Court emphasised that an individual may not rely on the fact that the law is never going to be changed. Legal expectations are safeguarded indirectly, taking into account the principle of trust in law and the principle of equality.

When the legislator encroaches upon the right in course of acquisition (the so called retrospective effect), it is not allowed to act arbitrarily. It is bound to choose appropriate and proportionate changes, which conform to set objectives and the principle of equity. When weighing the constitutional values it is important, on one hand, to estimate the significance of the expected right for the life of the affected person and the importance of the change. On the other hand it is important to define whether changes were relatively foreseeable and the affected persons could expect the law to change.⁵⁵

In order to protect legal expectations, the new legislative act has to regulate appropriate transitional periods. They have to be longer when modifying benefits which required longer qualifying periods and are provided for a longer period of time, like pensions. The Constitutional Court argued that pension insurance cannot tolerate quick radical changes. Reforms may be adopted only for the future and with a longer transitional period.⁵⁶ For instance, the minimum age for acquiring an old-age pension for women is progressively raised and the pension calculation base is progressively prolonged, since the latest pension reform, applicable from the beginning of 2013.

Longer adjustment period is required to respect the principle of trust into law. The length of the transitional period may be dependent on the nature of the change. Hence, the duration of the transitional period for each individual change cannot be ascertained on beforehand.⁵⁷ Transitional periods are rather important when the new legislative act is reducing social security benefit. If they are sufficiently long, the foreseeability of action is guaranteed and unequal treatment and disproportional burdening of certain generations of insured persons, prevented.⁵⁸

Modifications of the transitional period before its expiration are also possible. However, it should not be altered soon after it was adopted nor should it be changed very often. If the legal situation of insured persons would be worsened again rather quickly, the constitutional principles of trust into law and equality could be breached, as well as the essence of right to social security invaded.⁵⁹ The Constitutional Court also argued that although the principle of the state governed by the rule of law obliges the legislator to adjust the law to social relations, new changes to the legislation should not be done in a

⁵⁵ In the Decision No. U-I-31/96, 26.11.1998, OdlUS VII, 212, the Constitutional Court argued that in the case of valorisation of pensions, changes of the law are not a rare occurrence. Strban, 2010, p. 412.

⁵⁶ For instance Slovenian Constitutional Court decisions Nos. U-I-29/96, 8.05.1997, OdlUS VI, 56 and U-I-86/96, 12.12.1996, OdlUS V, 176.

⁵⁷ Constitutional Court decision No. U-II-1/11, 10.03.2011, Official Journal RS, No. 20/2011.

⁵⁸ Bubnov Škoberne, Strban, 2010, p. 201.

⁵⁹ Strban, 2010, p. 416.

very short period after the initial changes to the same legislation were introduced, as this may breach the constitutional equality principle.⁶⁰

4.4. Proportionality of legislative measures

When the legislator is modifying the scope of social security rights, he has to respect the principle of proportionality. It prohibits excessive legislative measures and was developed by the Constitutional Court from the constitutional provision on the state governed by the rule of law. The legislator is not entirely free when limiting human rights, including the right to social security.

The principle of proportionality is applied in two steps. First is the so called legitimacy test. It should be verified that the goal pursued by the State is legitimate, i.e. substantively justified, and the measures used by the State are legally admissible as such.

In the second step the quality of applied measures is tested and the adequate (legally correct) proportion between the goal and the measure is ascertained. This is the so called proportionality test. It consists of weighing whether the chosen measures are appropriate (the pursued goal can be achieved by using them), necessary (there is no lenient measure at the legislator's disposal to achieve the set goal), and proportionate to the value of pursued goal (the benefits that will result thereof). This principle of proportionality in the narrower sense should ensure proportionate relation between the burden, i.e. intrusion in the constitutional right of an individual (socially insured person), and the advantage gained (to protect rights of others and thus public interest).

Only, if all of these conditions are met, the legislator is allowed to intrude in the constitutional right. This test was often applied by the Constitutional Court, when changes to the social security system were introduced. In some, it was established that legislative action when changing the pension and invalidity insurance was based on the legitimate goal and the measures to achieve it were reasonable and proportionate.⁶¹ In others annulled certain modifications of the pension and invalidity insurance act, because the reasonable and direct relation to the legislator's goal and used measure could not be established.⁶²

4.5. Clarity and precision of legal rules

When the legislator is allowed to change individual's legal position, he may do so only with clear and precise legal rules. Individual's future behaviour and legal position has to be foreseeable, and legal certainty as an important element of the rule of law principle has to be guaranteed. The Constitutional Court reviewed certain legislative provisions also in the social security field.

It argued that legislative solutions have to be general and abstract. Their purpose should be clear, and the measures to achieve it accurately described. The legislator has

⁶⁰ Constitutional Court Decision No. U-I-69/03, 20.10.2005, OdlUS XIV, 75.

⁶¹ Constitutional Court decisions Nos. 150/94, 15.06.1995, OdlUS IV, 63, and 83/03, 15.09.2005, not published.

⁶² For instance Constitutional Court decisions No. U-I-29/96, 8.05.1997, OdlUS VII, 3 and OdlUS VI, 56.

to pass clear legal rules and determine their content. It is not admissible to leave such clear determination to some other body. If the norm is not clearly defined, the danger of different application of the law and arbitrariness of the social security administration, which decides on social security rights, may be present. The legislative act is in line with the Constitution, if its content can be determined by using grammatical and teleological interpretation and action of the bodies that have to apply it is clearly defined.⁶³

Conversely, if with the application of the interpretation tools, clear content of the challenged rule could not be determined and the behaviour of bodies deciding on the social security rights could not be foreseeable, then such legal rule is contrary to the rule of law principle.⁶⁴ It seems that especially in the field of mandatory health insurance legislative action is inadequate. The legislator leaves the determination of rights and duties of involved legal subject to the rules and regulations passed by the mandatory health insurance carrier (with consent of the minister of health).⁶⁵

In this sense, the Constitutional Court did not allow a so called naked mandate (i.e. a mandate without further instructions, guidelines and frameworks) of the legislative act to the mandatory health insurance carrier in order to determine lump-sum contributions for certain groups of insured persons. It establishes that legislative rule is not allowed to leave an independent regulation of rights and duties to the executive branch regulation, without precise grounds in the legislative act.⁶⁶

Constitutional Court decisions concern not only financing side of social security, but also the benefits side. One of the latest decisions was passed recently, again concerning the regulation of mandatory health insurance. It concerned the right to health care outside of Slovenia.

Slovenian legislator recognises the right of mandatory health insured persons to health care abroad, which is regulated in a more detailed manner in the Rules of mandatory health insurance.⁶⁷ The Constitutional Court argued in its decision⁶⁸ that until the last amendment (which transposed the Directive 2011/24/EU on the application of patients' rights in cross-border healthcare),⁶⁹ the Health care and health insurance act (ZZVZZ) enshrined the right to health care abroad without any limitation.⁷⁰ Its delegation to more precise regulation in the executive branch rules and regulations was found to be against the constitutional rights of social security and health care. The Constitutional Court established that it is for the legislative act to determine the scope of rights (including their limitations) and it is not admissible to do so originally in the Rules of mandatory health insurance.

⁶³ Constitutional Court Decision No. U-I-282/94 18.10.1995, OdlUS IV, 108 (unemployment insurance).

⁶⁴ Constitutional Court Decision No. U-I-279/00, 16.01.2003, OdlUS XII, 1 (mandatory health insurance).

⁶⁵ Strban, 2005, p. 151.

⁶⁶ Constitutional Court Decision No. U-I-390/02, 16.06.2005, OdlUS XIV, 58.

⁶⁷ Official Journal RS, No. 79/1994 – 25/2014.

⁶⁸ Decision No. Up-1303/11, U-I-25/14, 21.03.2014. Official Journal RS, No. 25/2014.

⁶⁹ So called the Patient mobility Directive, OJ L 88/45, 4.04.2011.

⁷⁰ Article 23/1 point 2 of the Health care and health insurance act (*Zakon o zdravstvenem varstvu in zdravstvenem zavarovanju – ZZVZZ*), Official Journal RS, No. 9/1992, last amendment in 91/2013.

With this decision the Constitutional Court protected the right to health care abroad, but also opened many questions. For instance, did before the last amendment of the ZZVZZ insured persons have an unlimited right to (necessary and planned) health care abroad, also for the benefits not covered under the Slovenian mandatory health insurance (like helicopter transport)? Such, broad construction of the right would not be appropriate. It is enshrined in the ZZVZZ, which is regulating the rights from mandatory health insurance (in Slovenia and the same rights abroad). In addition, limitation of financial responsibility of the member state of insurance to cover medical treatment in another (EU) member state exists only for benefits covered under its legislation (regardless the legal instrument used, i.e. social security coordination Regulations or Patient mobility Directive).

The question of validity of already decided cases by the ZZVZZ and social court, which have become final before the decision of the Constitutional court was taken, might become questionable. However, there are limited possibilities for their review. Distinctive decisions after annulment part of the Rules of mandatory health insurance may lead to unequal treatment of insured persons. More generally, the validity of entire Rules might become questionable. Although, slightly formalistic decision of the Constitutional Court, it is a good incentive for the legislator to regulate the rights from mandatory health insurance in a more precise manner. At the end, this may improve the legal position of socially insured persons.

5. Equality of treatment

Principle of equality is one of the fundamental constitutional norms.⁷¹ It ensures the right of the individual to equality in the law and before the law, i.e. when the law is being applied. It is argued that together with the principle of the state governed by the rule of law and the social state principle, it presents the realisation of the principle of justice (equity) in the Constitution. The equality principle is one of the most common arguments used by the parties before the Constitutional Court.

It is settled case-law of the Court that the principle of equality could not be understood as simple general equality of all, but as equal treatment of equal factual situations. The principle of equal treatment does not mean that the law should not regulate the position of legal subjects differently. It means that this should not be done arbitrarily, without sound and valid reason. The principle of equality binds the legislator to regulate equal situations in an equal way and dissimilar situations in a distinct way.

The Constitutional Court evaluates the admissibility of the impact on the right to equality according to the arbitrariness test (and not according to stricter test of proportionality, where *inter alia* the necessity of intrusion for the safeguarding of the rights of others must be demonstrated). For the admissibility of intrusion, any non-arbitrary, i.e. sound and from the nature of the matter derived reason for distinction suffices.

In many cases the Constitutional Court found no breach of the Constitution and rejected the claim. For instance, such decisions in the field of social security were issued

⁷¹ Article 14 of the Slovenian Constitution.

when different professional groups were treated distinctively,⁷² when elderly unemployed were provided special protection,⁷³ or when the legislator distinguished between men and women in pension insurance.⁷⁴

Allowing women to be entitled to an old-age pension earlier than men was found in accordance with the Constitution. The Court argued that distinction based on gender is allowed, when it serves to establishment of substantive (material) equality between genders, where there are objective biological or functional differences. In this case the legislator is not only bound by the prohibition of discrimination, but (in particular) by the duty of positive action. Discrimination is thus allowed when the equalisation of disadvantages is based on traditionally and historically distinctive social roles.⁷⁵

This decision was taken decade and a half ago, and it might be interesting to see how the Court would react today, especially after the new pension reform was passed at the end of 2012. Women and men are as a rule treated equally in relation to qualifying conditions, but the distinction remained when calculating the pension. The question may be, whether distinctive calculation is in line with Directive 79/7/EEC,⁷⁶ since this exception is not explicitly mentioned in its Article 7. The Court of Justice of the EU argued that Article 7(1)(a) of the Directive entitles the Member State concerned to calculate the amount of pension differently depending on the worker's sex, if national legislation has maintained a different pensionable ages for women and men.⁷⁷ However, when national legislation has abolished the difference in pensionable ages, Member States are no longer authorised to maintain a difference according to sex in the method of calculating the pension.⁷⁸

In some other decisions the Constitutional Court annulled some of the provisions of the law, because they were discordant with the constitutional principle of equality. For instance, setting self-employed in a worse position compared to employed persons concerning the right to a partial pension⁷⁹ or social security rights of disabled persons (of category III invalidity),⁸⁰ permanent residence of the child as one of the eligibility conditions for acquiring the right to child benefit,⁸¹ or citizenship of the child to calculate certain period of child rearing into pension insurance period⁸² were found to breach the constitutional equality principle.

⁷² E.g. decisions Nos. U-I-307/98, 5.12.2002, OdlUS XI, 252 (pension and invalidity insurance), and U-I-66/98, 18.04.2002, OdlUS XI, 68 (child benefit).

⁷³ Constitutional Court Decision No. U-I-282/94, 18.10.1995, OdlUS IV, 108.

⁷⁴ On gender differences in social protection Strban, 2012/1.

⁷⁵ Decision No. U-I-298/96, 11.11.1999, OdlUS, VIII, 246.

⁷⁶ Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ L 6, 10.01.1979.

⁷⁷ Distinctive calculation has to be necessary and objectively linked to the difference in retirement age. Joined Cases C-377/96 to C-384/96 *De Vriendt and Others* [1998] ECR I-2105.

⁷⁸ Case C-154/92 *Van Cant* [1993] ECR I-3811.

⁷⁹ Constitutional Court Decision No. U-I-358/04, 19.10.2006, OdlUS XV, 72.

⁸⁰ Constitutional Court Decision No. U-I-40/09, 4.03.2010, Official Journal RS, No. 27/2010.

⁸¹ Constitutional Court Decision No. U-I-31/04, 1.12.2005, OdlUSXIV, 86.

⁸² Constitutional Court Decision No. U-I-273/01, 18.11.2004, OdlUS, XIII, 78.

6. Threats to and protection of social security rights in the times of economic crisis

In Slovenia the economic crisis or even recession persisted for quite a long period of time. Fiscal policy was focusing on reducing public spending, which included cutting back social security rights. However, there was strong opposition, especially from trade unions and the first proposal of reforming the pension and invalidity insurance was rejected at the referendum in 2011.⁸³ In 2012 economic activity in Slovenia further declined by 2.3 per cent, according to the report of the Slovenian Institute of macroeconomic analysis and development.⁸⁴ However, in 2014 the good news was that in the last quarter of 2013 the gross domestic product increased for 2.1 percent.⁸⁵

During the economic crisis, some, relatively modest measures were undertaken, for instance increasing the pensionable age to 65 years (or 60 with at least 40 years of qualifying period), different calculation of pensions (which may under certain circumstances fall below 40 per cent if reductions for early retirement are taken into account, which may be questioned from the ILO minimum standards point of view),⁸⁶ no indexation of pensions, which was prolonged in years 2014 and 2015⁸⁷ (and they will never reach the same levels again).⁸⁸ In addition a general tax relief for persons aged 65 or more when determining the personal income tax has been abolished at the end of 2013.

Conversely, more benefits have been introduced for unemployed workers, like special rules apply to younger unemployed persons, i.e. those below 30 years of age. Instead of nine months, six months of unemployment insurances (in the same period, i.e. last 24 months) suffices for acquiring an unemployment benefit. However, entitlement lasts only for two months (normally from three to 12 months or longer for older unemployed persons). It might be questioned whether this is in line with the ILO Convention No. 102 on minimum standards of social security. According to the Convention, minimum duration of unemployment benefit should be at least 13 weeks (which is approx. three months).⁸⁹ Additionally the entitlement of paying pension contributions for elderly unemployed persons, who have exhausted the right to unemployment benefit, was prolonged from one year to two years, if a person could retire in this period. However, the entitlement is limited *ratione temporis* until March 2018.

For the first three months of unemployment, the unemployment benefit was increased to 80 per cent of the calculation base (average salary in last eight months), for the next nine months it was reduced to 60 per cent and after a year it is only 50 per cent of the

⁸³ Strban, 2011, p. 2.

⁸⁴ More at <http://www.umar.gov.si/en/>, May 2014.

⁸⁵ More at <http://www.stat.si/>, May 2014.

⁸⁶ ILO Convention No. 102 on minimum standards of social security advocates pension level of at least 40 per cent (Article 67). Novak et al., 2006, p. 375.

⁸⁷ Article 56 of the Implementation of the Republic of Slovenia Budget for 2014 and 2015 Act (ZIPRS1415, Official Journal RS, Nr. 101/2013).

⁸⁸ Pensions are (partially) adjusted to the increase in wages. It was argued that in the time of economic crises, pensions could be increasing. The reason may be that many low paid workers lost their jobs and the average wage increased. Such effect was prevented by not adjusting pension amounts during the economic crisis. But this may affect persons with low pensions (mostly women) to a larger extent. Strban, 2012/1, p. 31.

⁸⁹ Article 24 of the ILO Convention No. 102.

calculation base. The legal situation has deteriorated the most for elderly unemployed persons, who are entitled to unemployment benefit for more than year. However, they have more difficulties for finding a job and should enjoy more, not less protection.

Social security rights are protected by already analysed general constitutional principles, like the social state, state governed by the rule of law, and equality principles, as well as fundamental social rights. Next to that the constitutional guarantee of the right to private property⁹⁰ is gaining importance in protecting social security rights (especially from contributory schemes, and in particular pensions). This might be important, since traditional concepts of private property usually afford the best legal protection.

Slovenia is bound by the European Convention on Human Rights (ECHR)⁹¹ and its interpretation by the European Court of Human Rights (ECtHR). The latter has already applied the property protection arguments⁹² to social security rights. It considered a social security right as pecuniary right without it being necessary to rely solely on the link between entitlement to social security right and the obligation to pay taxes or other contributions.⁹³ The ECtHR has gone even further and recognised property protection also to non-contributory rights,⁹⁴ which was not undisputed.

Also the Slovenian Constitutional Court has confirmed the double nature of the right to a pension. It is protected with the constitutional right to social security as well as the right to private property.⁹⁵ The latter is broader from the civil law concepts of property. It is guarantee that provides freedom of a person with respect to his/her property.⁹⁶ The Court broadened the personal scope of the constitutional right to social security (or at least to a pension)⁹⁷ also to non-Slovenian citizens.

The Constitutional Court argued that the constitutional essence of the rights to a pension is the right of a person to receive a pension (under reasonably set conditions) which provides social security.⁹⁸ It established that the Constitution cannot guarantee a pension at a certain level, but the pension has to be proportional to income from which the contributions were paid. It cannot be reduced to a social assistance minimum.⁹⁹ It went even further and found that the possibility of an employer to negotiate deferment, payment in instalment or writ-off of social security contributions may be to the detriment of a worker and is against the constitutional right to private property.¹⁰⁰

⁹⁰ Article 33 of the Constitution.

⁹¹ Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe, Rome 1950.

⁹² C.f. Article 1 of Protocol 1 to the ECHR.

⁹³ E.g. *Gaygusuz v. Austria* (16.09.1996, Reports 1996-IV), also *Klein v. Austria*, no. 57028/00, 3.03.2011, final 30. 6. 2011.

⁹⁴ *Koua Poirrez v. France*, no. 40892/98, 30. 9. 2003, final 30.12.2003, Reports 2003-X. Kapuy, Pieters, Zaglmayer, p. 278.

⁹⁵ Constitutional Court decision No. Up-770/06, 27.05.2009, Official Journal RS, No. 54/2009, also U-II-1/11, 10.03.2011, Official Journal RS 20/2011.

⁹⁶ Constitutional Court decision No. Up-156/98, 11.02.1999, OdlUS VIII, 118.

⁹⁷ The Constitutional Court used the property argument with regard not only to an old-age, but also to widow/er's pension (Up-1419/08, 22.10.2009, OdlUS XVIII, 87).

⁹⁸ Constitutional Court decision No. Up-360/05, 2.10.2008, OdlUS XVII, 85.

⁹⁹ Constitutional Court decision No. U-II-1/11, 10.03.2011, Official Journal RS, No. 20/2011.

¹⁰⁰ Constitutional Court decision No. U-I-281/09, 22.11.2011, OdlUS XIX, 29.

7. Development of social security rights *de lege/constitutione ferenda*

Social security rights will have to be developed and adjusted to ever changing social relations also after the economic crisis. In Slovenia there is a discussion on long term care insurance. Long-term care benefits are very diverse across Europe and there is hardly any common definition. In Slovenian social security system persons reliant on long-term care might be entitled to distinctive benefits in kind and in cash, ranging from social insurance to social assistance and social compensation schemes. Benefits in kind are provided in a form of social services (home, semi-residential and residential care) or linked with health services in recently established nursing hospitals.

Cash benefits are paid directly to a person reliant on long-term care. How the money will be spent (will a formal or informal caregiver be paid or will it be saved for future days) is in the discretion of the recipient. Assistance and attendance allowance is provided to (old-age, invalidity, widow/er's or family) pension recipients in two levels. Similar one is granted to social assistance recipients, disabled persons not entitled benefits from invalidity insurance and war invalids. Special family benefits are provided to parents of children reliant on long-term care.

Problems of a mixed system could be that the overview of long-term care benefits might be lost, since they are linked to health care, pensions, disabled children, social assistance etc. In addition, no common social policy could be developed. Therefore, reliance on long-term care has been recognized not as a completely new, but as independent social risk in the proposal for the new legislative act.¹⁰¹

New social insurance branch should be established, but long-term care insurance should be linked to mandatory health insurance (and its carrier). For instance, it should suffice that the reliance on long-term care is expected to last for at least three months and at least four hours a day. No levels of reliance on long-term care are foreseen. Instead, the long-term care coordinator (of the insurance carrier) should organize care and propose an individual plan of long-term care in cooperation with the beneficiary and his or her family. Priority should be given to benefits in kind, provided by contracted providers. This way, a double social risk might be avoided, i.e. at the person reliant on care and person (usually female family member) providing it.¹⁰²

Introducing long-term care insurance would fit under already existing constitutional provisions, mentioning also other social insurances. However, if more drastic modifications of social security rights would be proposed, the constitution would have to be changes as well. One of such proposals, which at the end did not find its way into the governmental coalition agreement, concerns the universal basic income.

There are still some open questions, how should universal basic income look like (should it be unconditional or not), who should be entitled, which social security schemes should be abolished (social assistance, family benefits, unemployment, or even pension insurance), and what should be its level? For the moment the arguments that universal basic income is neither suited to social security benefits in kind, nor to distinctive legal

¹⁰¹ The proposal was prepared by the Ministry of labour, family, social affairs and equal opportunities in 2010.

¹⁰² Strban, 2012/2.

positions of persons entitled to social security rights, and that lump-sum payment could cause more inequalities than introduce equality, prevail. For the moment there is no concrete legislative proposal or proposal to modify the constitution accordingly. It is argued that effort should be invested and adjust the already existing social security rights.

8. Concluding thoughts

In the times of economic recession, in many countries social security rights were at the frontline of austerity measures. In Slovenia, cuts in social security rights were rather important, but at the same time not excessive. When many legislative acts are modified, or new are adopted, more questions on their harmony with constitutional principles and values could be raised. Hence, the constitutional protection of social security rights is tested more often in the times of crisis.

Legal position of the individual is better protected, if the State has to respect not only the social state principle (which may be broader than social security, touching upon the regulation of taxes, housing benefits, labour and education rights) and fundamental social rights, but other principles and human rights as well. Among them are the most relevant the equality and the rule of law principles (protecting also legal expectations and preventing drastic changes during the recession periods) and the right to private property. The latter might be important in purely internal situations, but also when people move to a country with which no social security coordination instrument exists.

However, also the Constitution may have its limits and might not afford complete protection. For instance in the Slovenian Constitution the right to social security is limited to Slovenian citizens, there is no mentioning of social assistance or equal treatment of same sex partners (explicitly so in the EU law). In addition, there are no minimum standards of social security rights prescribed by the constitution. Therefore, the interpretation of constitutional provisions by the Constitutional Court (and social courts) is of utmost importance. It has to be dynamic and adjusted to the modified social relations. Constitutional guarantees are only as much effective as they are protected by the Constitutional Court as the guardian of the Constitution.

Moreover, it seems that social security rights are best protected, if not only constitutional and EU law provisions are respected, but also minimum standards of the International Labour Organisation and the Council of Europe are ratified and applied. Only this way the duty of the State to provide security to its citizens, including social security, can be fulfilled.

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Summary

In Slovenia there are several constitutional provisions, which are rather important for shaping the social security system and limiting the legislator when he wishes to reduce the (personal and/or material) scope of social security rights. In Slovenia its meaning has been explained by the Slovenian Constitutional Court and legal theory, although, to far lesser extent than the principle of the state governed by the rule of law.

Keywords: Slovenia, social security, constitution